

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
ATHENS DIVISION

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SARA WHYTE : Case No. 3:18-CV-62-CAR  
Plaintiff  
VS. : May 21, 2018  
NATIONAL BOARD OF MEDICAL : Macon, Georgia  
EXAMINERS :  
Defendant :

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TRANSCRIPT OF TRO HEARING  
BEFORE THE HONORABLE C. ASHLEY ROYAL,  
UNITED STATES COURT DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: RALPH GOLDBERG  
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1 May 21, 2018

2 3:30 P.M.

3 THE COURT: Good afternoon.

4 ATTORNEYS COLLECTIVELY: Good afternoon, Judge.

5 THE COURT: I'm Judge Royal, and we have a TRO  
6 Motion here and we have a hearing related to that.

7 I have been through quite a bit of the material that  
8 has been submitted to me. I think I have a pretty good  
9 understanding about what this case is about. I think I have a  
10 good understanding about the law related to the ADA.

11 And I want to start out by making a few observations  
12 here. You know, I don't get a lot of TROs filed in Federal  
13 Court. I may get two or three a year. I may have had 30 or  
14 40 over the time that I have been here. And the problem with  
15 the TRO is that -- as the law explains it, and I'm sure the  
16 lawyers are familiar with -- because of preliminary  
17 injunction, or in this case a TRO, is an extraordinary and  
18 drastic remedy its grant is the exception rather than the  
19 rule. The Plaintiff must clearly carry the burden of  
20 persuasion.

21 Now, the lay people in this room don't understand  
22 that but the lawyers do, and that is one of the highest  
23 standards that we have to deal with in granting or denying a  
24 motion. So that's very important.

25 Of course, there are elements that we have for a

1 TRO. The first one is there has to be a substantial  
2 likelihood of success on the merits. There has to be  
3 irreparable harm to the Plaintiff if the TRO is not issued.  
4 The threatened injury must outweigh the harm that the TRO  
5 would cause to the nonmoving party and that the TRO must not  
6 be adverse to the public interest.

7 It seems to me, in this particular case, that the  
8 question is, one, is there a substantial likelihood of success  
9 on the merits and, two, is there going to be irreparable harm.  
10 Those seem to me to be the issues.

11 Now, I will give you the opportunity to disagree  
12 with me if you don't think that's accurate and if it's not  
13 accurate tell me why it's not.

14 Don't stand up in my courtroom. That's the usual,  
15 but we don't do it that way here because I want you by that  
16 microphone, okay. And it's going to take you a couple times  
17 trying to stand up and I'm going to wave you off again, but  
18 that's fine. Go ahead.

19 MR. GOLDBERG: Your Honor, you are generally right.  
20 However, the Circuit Law is that it's also a sliding scale and  
21 that it isn't like you have to prove each and every of those  
22 four parts you just talked about. And I cited in my brief the  
23 *Texas versus Seatrain* where the Court says that there are  
24 those four standards --

25 THE COURT: Right.

1 MR. GOLDBERG: -- but it says that they must show  
2 that you're going to win is basically a negative standard.  
3 And what they mean is this: That if you have no chance of  
4 winning you're out, but that you don't have to show, even by a  
5 preponderance of the evidence, that you will win. Wright and  
6 Miller call it the prima facie case. But *Texas versus*  
7 *Seatrain* talks about the idea that you have to show a  
8 probability of winning, and it talks about the idea that it is  
9 a sliding scale. So that, for example, the greater the harm  
10 the less likely you need to show that you can win even though  
11 you -- you have to make some showing that you would win. You  
12 can't simply say "I have all this harm" if you know you're  
13 going to lose.

14 THE COURT: All right. Is it Mr. Horkan? Who do we  
15 have for the Defendant?

16 MR. GILLIS: Your Honor, Mr. Gillis.

17 THE COURT: Are you going to respond to that?

18 MR. GILLIS: Yes, Your Honor. I do agree with the  
19 Court that the first two elements are the most important here.  
20 However, I do think that the Plaintiff should be required to  
21 meet all four of the elements and it's our position that she  
22 can meet none of them.

23 THE COURT: Okay. Well, that's fine. We will deal  
24 with that in just a minute.

25 And, of course, I'm familiar with the ADA and the

1 requirements related to that, and it seems to me that under  
2 the circumstances of this case -- and again I'm trying to  
3 narrow down some of the issues -- it seems to me that the real  
4 question in this case is whether she has a disability as  
5 defined under the ADA. I wouldn't think that the  
6 reasonableness of the accommodations she is requesting is  
7 really at issue in this case. And I can't imagine that this  
8 somehow alters the course of business, whatever, of the  
9 Defendant in this case.

10 So is this a case involving whether or not she has a  
11 disability or is it more than that?

12 MR. GOLDBERG: Your Honor, I think it really --  
13 really whether or not she has a disability. The  
14 accommodations that she's asking for are nothing extraordinary  
15 in ADA litigation.

16 THE COURT: All right. Mr. Gillis?

17 MR. GILLIS: Your Honor, we would agree that  
18 disability is the largest question. The only thing my client  
19 would like the Court to know is it's not as simple as just on  
20 Wednesday when this test is administered giving her  
21 accommodations. The program has to be recalibrated and a room  
22 has to be found. But those are things that have to be dealt  
23 with in the relief she's seeking.

24 THE COURT: Right.

25 MR. GILLIS: But as far as what she's asking for

1 it's more the practical implications of those.

2 THE COURT: The mechanical part of it?

3 MR. GILLIS: Yes, Your Honor.

4 THE COURT: Not the legal part of it?

5 MR. GILLIS: Yes, Your Honor.

6 THE COURT: So we're dealing with the disability  
7 issue here.

8 Let me just go through this and make a few  
9 observations. I didn't find in the report that she -- that  
10 you gave me -- hold on. Let me see if I can find it. I  
11 didn't find in the 1988 report that she was diagnosed with  
12 ADHD. Am I correct in that?

13 MR. GOLDBERG: Your Honor, I do not agree with that.  
14 And let me see if I -- I'm not going to tell you that  
15 everything I'm about to tell you is in one piece of paper, but  
16 let me see if I can take you through this.

17 Your Honor, I sent something called a Student  
18 Accommodation Plan which is one of my exhibits from the  
19 Decatur Schools and this is in 1999.

20 THE COURT: We're not talking about 1999. We're  
21 talking about 1988. We're talking about 1988. We're talking  
22 about the Behavioral Institute of Atlanta, evaluation dates  
23 5-5, 5-9, final conference 5-12-1988. That's what we're  
24 talking about.

25 MR. GOLDBERG: Your Honor, in the Behavior Institute

1 I do not see anything, but I do note that in Dr. Raque's  
2 affidavit -- you're right. Your Honor, he goes to 1996. So  
3 in 1998 there is nothing. You're right.

4 THE COURT: And, of course, that's one part of the  
5 diagnosis under the DSM-5 now, I guess, that this diagnosis  
6 needs to be made early in childhood; isn't that correct?

7 MR. GOLDBERG: Yes, Your Honor. But early in  
8 childhood under DSM-5 doesn't mean seven. It means 12 years  
9 old.

10 THE COURT: And was it made by 12? I'm not clear  
11 about that.

12 MR. GOLDBERG: My client believes that it was, Your  
13 Honor.

14 THE COURT: What would have been the occasion for  
15 that?

16 MR. GOLDBERG: I think it's the Student  
17 Accommodation Plan that is dated January 14th, 1999, which  
18 talks about how she has been diagnosed with Attention Deficit  
19 Disorder and Learning Disability and their participants -- the  
20 very bottom participant is Marty Avant --

21 THE COURT: So she would have been 17 at that point?

22 THE PLAINTIFF: Yes, Your Honor.

23 THE COURT: This was when you were a junior in high  
24 school?

25 THE PLAINTIFF: Yes. But I was diagnosed when I was

1 eight years old. I went to a school called the Schenk School.  
2 I couldn't read, and they diagnosed me there with ADD -- they  
3 didn't have the H back then --

4 THE COURT: Right.

5 THE PLAINTIFF: -- and learning disability in  
6 reading. I can't find the form though to find where it was  
7 written there.

8 THE COURT: I don't remember seeing that.

9 MR. GOLDBERG: Your Honor, I don't remember showing  
10 it too, in all honesty.

11 THE COURT: Well, that would have been helpful,  
12 wouldn't it?

13 THE PLAINTIFF: Well, I have all that paperwork.

14 THE COURT: Well grab it then. And, of course, that  
15 was not available to the -- that was not available to Benjamin  
16 J. Lovett Ph.D. who apparently was -- I take it -- was an  
17 independent contractor for the Defendant; is that correct?

18 MR. GILLIS: Yes, Your Honor.

19 THE COURT: That you got to do an evaluation --

20 MR. GILLIS: Yes, Your Honor.

21 THE COURT: -- and made the comment in the report  
22 that it was only in the 11th grade that this diagnosis was  
23 made or maybe didn't say it quite like that, but that was the  
24 first time there was some effort to somehow accommodate this  
25 problem.



1 MR. GILLIS: Yes, Your Honor. We take the position  
2 that the 504 plan in 1999 does not make a diagnosis, but does  
3 discuss the issues, but makes no diagnosis.

4 THE COURT: Right. Okay.

5 I'm interested now -- I have some questions that  
6 need to be answered by the Plaintiff, and I'm wondering if it  
7 might be better just to put her under oath and let her take  
8 the witness stand and then she can be cross examined if  
9 necessary. Because in reviewing these various reports there  
10 are certain things that aren't clear and she may be able to  
11 give some clarity to some of those things.

12 Part of the problem with her sitting there and  
13 answering is it's hard to hear her. She's not over there by  
14 the microphone. And typically in a hearing like this the  
15 witnesses would be under oath. Sometimes I'm informal, but --

16 MR. GOLDBERG: Your Honor, if you want her under  
17 oath, of course, if you want her next to the microphone I'll  
18 move my microphone over and share my partner's microphone.  
19 Whichever one you want.

20 THE COURT: I think it would be better to put her up  
21 here because he can see her -- Mr. Gillis can see her better.  
22 That would be the best way to do this.

23 MR. GOLDBERG: Your Honor, I believe that what she  
24 is referring to is in your record. It's from the Behavior  
25 Institute of Atlanta. I'm not certain, in all honesty, that

1 they made an ADHD diagnosis. I think they made a learning  
2 disability diagnosis.

3 THE COURT: Well, she had a learning disability  
4 diagnosis at one point and then later -- I think it was in  
5 this report that I'm getting ready to cover -- she didn't have  
6 a learning disability diagnosis.

7 MR. GOLDBERG: University of Georgia said she did  
8 not. I must say that Dr. Raque thinks she does.

9 THE COURT: Well, I'm going to have to tell you I'm  
10 not impressed with his affidavit. I'm not convinced that it  
11 satisfies Rule 702. It looks to me like he's just adopting  
12 what's in this report, and I found that to be problematic,  
13 especially since the time that he dealt with her was so much  
14 earlier.

15 So I read that. I understand what it says, but I  
16 didn't find it very compelling, not to mention I think there  
17 may be 702 problems with it.

18 MR. GOLDBERG: Your Honor, we are prepared to rely  
19 upon the University of Georgia report.

20 THE COURT: Right. Well, that's what we're getting  
21 ready to talk about, and, so, this is my first question.

22 Go ahead and swear her in, please.

23 COURTROOM DEPUTY: Do you solemnly swear that your  
24 testimony in this case shall be the truth, the whole truth,  
25 and nothing but the truth, so help you God?

1 THE PLAINTIFF: Yes.

2 COURTROOM DEPUTY: State your name for the record  
3 please.

4 THE PLAINTIFF: Sara Whyte.

5 COURTROOM DEPUTY: Spell your last name.

6 THE PLAINTIFF: W-H-Y-T-E (spelling).

7 THE COURT: Let me just explain to you. Mr. Gillis  
8 has been in my court before, but you never have, and I don't  
9 generally run my court in the way judges often do where I let  
10 the lawyers stand up and make a long argument.

11 Typically what I do is I go through and talk about  
12 the evidence that I find that's important. I ask questions  
13 about it, and then I move through and you can listen and  
14 you'll hear what I think is important in the case, and then I  
15 always give the lawyers the opportunity to respond. But  
16 proceeding this way I generally find out what I want to know  
17 much faster than if I just let the lawyers talk.

18 MR. GOLDBERG: Your Honor, Judge Owens used to do  
19 the same thing. I remember at one point he was asking  
20 questions and the Attorney General's office got up and  
21 objected and I couldn't believe it. So I'm used to this.

22 THE COURT: Okay. So what happened -- what was the  
23 occasion in March of 2015 for you to have this examination  
24 that was done?

25 THE PLAINTIFF: So I was in medical school.

1 THE COURT: Right.

2 THE PLAINTIFF: And I was applying to take Step 1 of  
3 the USMLE. And I've always had accommodations from the time I  
4 was in high school until all the way through medical school.  
5 So I applied for accommodations and they denied it and said  
6 that my latest testing, which was the one at the time done by  
7 Dr. Lancelot, was too old and I needed to be retested.

8 So I failed the exam. So I decided I'll try again,  
9 but this time I'll get the testing done, so I went and got the  
10 testing done, and then I applied again and they still denied  
11 me.

12 THE COURT: Well, one of the observations made here  
13 -- and y'all are welcome to follow along with me. I'm now on  
14 page 2 down at the very bottom of the page, last sentence.  
15 And, of course, a lot of this report is made up of  
16 self-reported information or information reported by people  
17 who, I guess, family members, friends. I'm not exactly clear  
18 who all it was. So there is a lot of self-reporting that goes  
19 on here.

20 It says: "Relative to her high average overall  
21 ability, as a well as the general population, she has  
22 exhibited an academic deficit in reading efficiency, which  
23 involves reading rate and the understanding of text-based  
24 passages under time conditions."

25 Now, is that your statement or is that an opinion?

1 Do you know?

2 THE PLAINTIFF: It's a --

3 THE COURT: I'm trying to understand if that's what  
4 you said or if that's what this --

5 THE PLAINTIFF: That's what the Doctor is saying.

6 THE COURT: That's what the Doctor is saying based  
7 on what you said or do you know if that's an opinion that he's  
8 giving?

9 THE PLAINTIFF: I think he is basing it off of all  
10 of the testing that he did, which also included some  
11 self-reporting. But there was two days worth of testing.

12 THE COURT: Well, part of the testing that we're  
13 talking about that he did there was at least one objective  
14 test, and on that particular objective test you scored okay.  
15 Do you remember that?

16 THE PLAINTIFF: No. Which test?

17 THE COURT: Tell you what, let me go through this in  
18 this order.

19 THE PLAINTIFF: Okay.

20 THE COURT: It says: "Although Ms. Whyte was  
21 previously diagnosed with a learning disorder, -- now I'm on  
22 page 3, first full paragraph -- her pattern of test results  
23 based on current evaluation suggests that she no longer meets  
24 criteria for a learning disorder diagnosis." And I think that  
25 you conceded that.

1           It goes on to say: "Relative to the general  
2 population, Ms. Whyte's basic reading decoding fell well  
3 within the average range. It appears that many of her  
4 learning disorder difficulties have been remediated, likely as  
5 a result of the intensive and specialized training that she  
6 received during the elementary school years at the Schenk  
7 School."

8           And so, I mean, here -- and, of course, this is one  
9 of the important points -- might be the most important point  
10 that the Defendant is making -- is that if we're going to do  
11 an analysis here to determine whether or not she has a  
12 disability that analysis needs to be based on the average.

13           And I understand that the Plaintiff's counsel  
14 disagrees with that and it's supposed to be within her peers,  
15 which in this particular case would be all medical students.  
16 But it appears that she is well within the average range based  
17 on this testing that was done.

18           Am I misunderstanding that?

19           MR. GOLDBERG: Your Honor, let me refer you to -- I  
20 don't think you are misunderstanding this but let me refer you  
21 to the test at the very back of the Georgia --

22           THE COURT: We're going to get there. I have these  
23 things highlighted. So I'm going through my highlights and  
24 when I get through these I'm going to let you offer whatever  
25 you want to offer from this report. I'm trying to make sure

1 that I understand some of the things that are stated here. I  
2 think I do, but I don't know for sure that I do.

3 THE PLAINTIFF: Sir, my reading comprehension was at  
4 30 which is actually at the cutoff line for below average and  
5 average.

6 THE COURT: But is it 30 among college educated  
7 people or is it 30 among all people? Because I've understood  
8 it's 30 among college educated people.

9 THE PLAINTIFF: It is, yes.

10 THE COURT: And only 40 percent of the population in  
11 America has a college degree.

12 THE PLAINTIFF: College seniors.

13 THE COURT: Right.

14 MR. GOLDBERG: Your Honor, since she opened it up,  
15 the same thing also shows that she has a reading speed which  
16 goes into the understanding.

17 THE COURT: That's the 6 percent.

18 MR. GOLDBERG: That's the 6 percent.

19 THE COURT: Right. We're going to come to that.  
20 Because I need some clarity on that.

21 And then page 5 says -- and this is the last  
22 sentence of the next to the last paragraph -- "Given that the  
23 reported and observed symptoms primarily involve inattention,  
24 a diagnosis of ADHD, inattentive type is supported by the  
25 current evaluation."

1           Now, tell me about this evaluation that was done  
2 here. What did they do? Obviously -- I know they tested you  
3 but what else did they do?

4           THE PLAINTIFF: What do you mean?

5           THE COURT: Well, how long were you there? How many  
6 people saw you? What did you do while you were there? Beyond  
7 the testing -- beyond the testing that was given, which I can  
8 read about.

9           THE PLAINTIFF: I was there for two days. And the  
10 first day was a full workday, eight or nine hours, and the  
11 second day was about a half workday, four to six hours.

12           I saw, I think, at least three grad students and  
13 Dr. Miller, may be one of his partners, I can't remember. We  
14 did a battery of exams. Some of the exams entailed reading to  
15 me and I would answer questions. It entailed me reading  
16 something and then answering questions. It entailed me taking  
17 an exam without extra time and then retaking it with extra  
18 time and showing the scores between that. It involved looking  
19 at made-up words and being able to read them and trying to  
20 come up with, I guess, a definition of the word. There was  
21 one test where I had to sit for 30 minutes and click a button  
22 every time a little red dot came up. It was awful.

23           I can't remember all of the exams. It has been  
24 three years. A lot of it didn't make a lot of sense. There  
25 was some math portions. I think I did a little bit of



1 calculus and algebra, and spacial awareness test where they  
2 give you shapes and then ask you to redraw them differently.

3 THE COURT: And how many people interviewed you?

4 THE PLAINTIFF: It must have been at least four,  
5 maybe five.

6 THE COURT: Altogether or at different times?

7 THE PLAINTIFF: Different times. I think it's all  
8 the people that signed at the end.

9 THE COURT: At the bottom of this page: "Ms. Whyte's  
10 husband's responses suggested internalizing problems in the  
11 clinical range which included clinically significant  
12 depressive symptoms." I think -- are you taking Wellbutrin?

13 THE PLAINTIFF: I am, sir.

14 THE COURT: How long have you been taking that?

15 THE PLAINTIFF: I just restarted it a month -- two  
16 months ago.

17 THE COURT: Is that an antidepressant?

18 THE PLAINTIFF: It is, sir, but it is also used for  
19 ADHD.

20 THE COURT: So it's for a combination of purposes?

21 THE PLAINTIFF: Uh-huh.

22 THE COURT: Are you taking it for depression or are  
23 you taking it for ADHD or are you taking it for both? Do you  
24 know?

25 THE PLAINTIFF: I'm taking it for both, I believe.

1 But I actually started taking Alazopram, but again that was  
2 for the ADD and the depression.

3 THE COURT: Now, I am on page 7, and I'm looking  
4 under Reading Efficiency, the first sentence there. "Reading  
5 Efficiency involves the ability to efficiently read and  
6 understand text-based passages under timed conditions.  
7 Mrs. Whyte's reading rate on a task that involved reading  
8 passages under timed conditions was borderline impaired" --  
9 and that puts you in the sixth percentile. Does this -- do  
10 you know and you may not know -- but does this mean how fast  
11 you can actually read the words on the page?

12 THE PLAINTIFF: Yes, sir.

13 THE COURT: That's what it means?

14 THE PLAINTIFF: Yes, sir.

15 THE COURT: So if I gave you this legal document to  
16 read you would only be able to read X number of words in a  
17 certain time period; is that right?

18 THE PLAINTIFF: Yes. I read at about the same -- I  
19 think it's about the same pace as if you were reading out  
20 loud. I'm not entirely sure, but that's my opinion from what  
21 I have gathered.

22 THE COURT: If I was reading out loud?

23 THE PLAINTIFF: Yes, if you read out loud which is  
24 usually faster than most people read in their head.

25 THE COURT: So that's what 6 percent means?

1 THE PLAINTIFF: I'm not sure. It's just my opinion.  
2 But that is what that means, I read slower.

3 THE COURT: You collected several degrees before the  
4 time that you got into medical school. You were very  
5 successful at Georgia Tech. You were very successful at  
6 Emory. And there seems to be some question in here raised by  
7 the Defendant's brief about when you didn't receive  
8 accommodations. What kind of accommodations did you get at  
9 Georgia Tech?

10 THE PLAINTIFF: I got time and a half for every exam  
11 and I got a MD room I took my exams in. On top of that they  
12 offered other things like a note taker, they offered to read  
13 all my books out loud for me, like a book on tape.

14 THE COURT: And was that in every class or just some  
15 classes?

16 THE PLAINTIFF: Every class. Every exam.

17 THE COURT: And then what about at Emory?

18 THE PLAINTIFF: I had the same things offered to me  
19 at Emory but their tests were not timed anyway, so I did  
20 not -- I used it sometimes, but not always.

21 THE COURT: All right. What about --

22 THE PLAINTIFF: So the time was more important.

23 THE COURT: -- what happened with you after January  
24 of 1999 in high school?

25 THE PLAINTIFF: I started -- they didn't really know

1     how to handle me at the time. They didn't have an empty room  
2     for me to take my exam in. Often I was put out in the hallway  
3     to take the exam. Other teachers just said, you know, come  
4     back after class to finish your exam. I was always given time  
5     and a half for my exams, but getting a quiet empty room was  
6     not possible at the time. However, my scores did go up. I  
7     made straight A's that year, I believe. I don't remember  
8     exactly, but I believe so.

9             THE COURT: When you took the SAT, if I understand  
10     correctly, you didn't have an accommodation then; is that  
11     correct?

12            THE PLAINTIFF: I did have accommodations then.

13            THE COURT: Oh you did. Okay.

14            THE PLAINTIFF: If you look at the test results that  
15     they sent there's a little asterisk on it.

16            THE COURT: Oh you're right. I'm sorry. I do  
17     remember that now. You took it twice. The first time you  
18     didn't do very well and the second time you did quite well.

19            THE PLAINTIFF: Uh-huh.

20            THE COURT: And there was some notation in there  
21     about -- it doesn't say what you got but you got something?

22            THE PLAINTIFF: Yeah. They don't like to say what  
23     you got.

24            THE COURT: What did you get with that?

25            THE PLAINTIFF: I got time and a half and I took the

1 exam in an empty classroom down at Georgia State. It was a  
2 written exam back then, handwritten.

3 THE COURT: What is the University of Georgia  
4 Regents Center for Learning Disorders? I'm not familiar with  
5 that. Tell me what that is?

6 THE PLAINTIFF: It's actually really well known for  
7 testing. One of the best places to get tested, from everyone  
8 in disability that I have talked to. I believe it's  
9 affiliated with Georgia at UGA. They do mainly testing  
10 there.

11 THE COURT: I mean, is it its own separate building  
12 or is it a part of some department, some University  
13 department?

14 THE PLAINTIFF: It's its own building, I believe.

15 THE COURT: And where is that?

16 THE PLAINTIFF: I don't remember the address, but  
17 it's on campus.

18 THE COURT: Okay. Not that that matters.

19 THE PLAINTIFF: It's in Athens.

20 THE COURT: It says you graduated from high school  
21 with a 3.85 and Georgia Tech with a 3.3 and then a 3.8 from  
22 Emory University. How much of that time were you on some kind  
23 of medication?

24 THE PLAINTIFF: I started taking Wellbutrin, I  
25 believe, in high school. So right around when I started --

1 when the 504 came about. It was suggested to me by my  
2 psychologist that I try Wellbutrin. I took it all the way  
3 through Georgia Tech, all the way through Emory and into  
4 medical school. I stopped it recently because my psychiatrist  
5 at UGA thought I was on too many medications, and after  
6 getting off of it I found that I was having a much harder time  
7 after the Vyvanse runs out. I also take Vyvanse.

8 THE COURT: So you have basically been on it for 20  
9 years?

10 THE PLAINTIFF: Yes, sir. I've gone up in amounts  
11 since I started though, or up in dosage.

12 THE COURT: Now I am on page 13. It appears that  
13 after you didn't pass the first part of this Step exam you  
14 took six months off?

15 THE PLAINTIFF: I took almost a year to study and  
16 retake the exam. I worked with a professor at school who went  
17 over practice exam questions with me and helped me see where I  
18 was missing questions, what I was missing and helped me figure  
19 out a way to get through the question without having to read  
20 the entire thing, because if I read the entire question I  
21 don't have time to finish the exam. I never take time to  
22 think, I just read the question and pick an answer is the only  
23 amount of time I have. And by the time I get through about  
24 the last ten questions I have about 30 seconds per question.  
25 The last three I have to figure out the answer based off of

1 maybe a word I have picked up and the question. I don't have  
2 any time to read even two sentences.

3 THE COURT: There is somewhere in here -- and I  
4 thought I would run across it but I didn't see it -- and it  
5 had to do with an objective test that you took. The objective  
6 test being for determining whether or not you had ADHD and  
7 that objective test reflected that you didn't have it.

8 Do you know where that is, Mr. Gillis, in the brief?  
9 What was that?

10 THE PLAINTIFF: Did you say "did not have it?"

11 MR. BURGOYNE: Your Honor, it's page 4.

12 THE COURT: Page 4 of the report?

13 MR. BURGOYNE: Page 4, Connors' Adult ADHD Rating  
14 Scale.

15 THE COURT: Okay.

16 MR. BURGOYNE: Your Honor, I finally chimed in. I  
17 apologize, it's page 5.

18 THE COURT: That was not what I was looking for.

19 MR. BURGOYNE: No, it's page 5, first full  
20 paragraph.

21 THE PLAINTIFF: May I get my copy of it so I can  
22 read along with you?

23 THE COURT: Well I still haven't found it.

24 MR. GILLIS: Your Honor, it's the paragraph  
25 beginning Ms. Whyte's performance on the Integrated Visual

1     Auditory.

2                 THE COURT:   Okay.   Here we go.   You're right.   Thank  
3     you very much.

4                 "Ms. Whyte's performance on the Integrated Visual  
5     Auditory continuous performance task, a computerized test of  
6     sustained attention, did not suggest" full "impairment." -- or  
7     suggest impairment, not full impairment.

8                 THE PLAINTIFF:   I had taken my Vyvanse --

9                 THE COURT:   Wait just a minute.

10                THE PLAINTIFF:   Sorry.

11                THE COURT:   "This may be due to the fact that  
12     Mrs. Whyte was taking her prescribed ADHD medication during  
13     the evaluation.   Further, it is likely that Mrs. Whyte's ADHD  
14     symptoms were minimized by the one-on-one, low-distraction  
15     setting in which the current evaluation took place."   So I  
16     will let you read this.

17                THE PLAINTIFF:   Thank you.   Okay.

18                THE COURT:   Now, the way I read this -- the way I  
19     understood this was that this was the objective test that is  
20     commonly used to determine whether someone has ADHD, and that  
21     this test didn't suggest impairment, meaning that it doesn't  
22     suggest that you have ADHD.   Am I misunderstanding this?

23                MR. GOLDBERG:   Your Honor, I believe you are  
24     misunderstanding it.   First of all, DSM-5 talks about looking  
25     at beyond testing.   But the very next paragraph -- the very



1 next paragraph tells why they are going to make a  
2 determination that she has ADHD. Even --

3 THE COURT: I'm asking you about this test. Am I  
4 misunderstanding the purpose of this test and what this test  
5 is supposed to show?

6 MR. GOLDBERG: Your Honor, I'm going to let my  
7 partner talk about that.

8 THE COURT: Okay, that's fine.

9 MS. CUVILLIER: The test that you were just talking  
10 about only measures attention, but ADHD has several  
11 components, attention as well as --

12 THE COURT: Her specific sub-diagnosis is  
13 inattention.

14 MS. CUVILLIER: Right, but that's just a type of  
15 ADHD.

16 THE COURT: Right.

17 MS. CUVILLIER: But ADHD also -- a diagnosis will  
18 also measure distractibility and also will measure impulsivity  
19 and the one that you are referring to only measured attention.

20 THE COURT: Okay. All right.

21 Now, I think maybe I am finished with this report.  
22 I'm finished with this report.

23 If somebody would like to ask her some questions  
24 about this or if you want to point out something to me about  
25 it I'll be happy to hear what you have to say.

1           MR. GOLDBERG: Your Honor, I do want to point out  
2 the next paragraph because DSM requires looking at clinical  
3 observations as well as testing.

4           THE COURT: Right.

5           MR. GOLDBERG: They put down the tested observation,  
6 but it doesn't change their result. I think that's the  
7 important point.

8           THE COURT: Right.

9           MR. GOLDBERG: Your Honor, I want to go back to that  
10 6 percent, because they did some tests on that 6 percent and  
11 what they found was this; she was given a test of 38  
12 questions.

13           THE COURT: She got all the ones right that she had  
14 time to complete?

15           MR. GOLDBERG: Right. But then they gave --

16           THE COURT: And then when she was given some extra  
17 time she got them all right?

18           MR. GOLDBERG: Right. And then we get back to the  
19 6 percent. Now, why is the 6 percent important? If you look  
20 at the letters in the National Board and I'm thinking of the  
21 letter -- I think it's the last letter, the April of 2018  
22 letter, but if not it's the other one, the October 2016  
23 letter. They talk about her being in the 30 percentile, but  
24 then they leave off that 6 percent as though, you know --  
25 number one, the 30 percentile, depending on how you look at

1 it, may itself be below average.

2 In the *Bartlett* case, which we cited numerous times,  
3 the Defendant's attorney in that case suggested that if you  
4 are at 30 percent by definition you are not within the  
5 average. Judge Sotomayor, you know, went off on something  
6 different, but that was the argument of the Defendant's  
7 expert. But what we're saying is when you get to 30 percent  
8 of comprehension and you add the 6 percent of reading speed  
9 that means that the comprehension rate, in a timed test, has  
10 always got to be lower.

11 THE COURT: Well, the 30 percent would seem to be a  
12 combination of the 6 percent and whatever else there was that  
13 made up that component of that. That's the way I understood  
14 it. Now I could be wrong, but that's why I'm giving you the  
15 opportunity to respond.

16 MR. GOLDBERG: Well, Your Honor, when I look at the  
17 testing results those tests scores are reported separately.  
18 They're not reported as one score. And they're not even  
19 reported as parts of the same score, and I think that's the  
20 point that they make.

21 On page 16 they had the NDRT and I'm looking, Your  
22 Honor, right about line 16 or so where it says NDRT. Do you  
23 see where I'm talking about?

24 THE COURT: Yes.

25 MR. GOLDBERG: First thing it says is Reading

1 Comprehension and then it says percentile 30 percent, but it  
2 doesn't stop there. It goes on to say Reading Rate 6  
3 percentile. Now, Your Honor, if I was reading it the way you  
4 would I would assume that there would only be one line which  
5 would be the Reading Comprehension rate. They're measuring  
6 two different things in those tests. That's the point that I  
7 would make.

8 THE COURT: I see. I understand what you mean.

9 MR. GOLDBERG: And I mention this because no where  
10 in any of the documents that the National Board has do they  
11 even talk about that 6 percent, it's as though it doesn't  
12 exist and it doesn't mean anything, but it does.

13 THE COURT: All right.

14 MR. GILLIS: May I respond?

15 THE COURT: No. I want to let him have the  
16 opportunity.

17 Is there something else you want to offer from this?

18 Then, I'll be happy to hear from you about that.

19 MR. GOLDBERG: Your Honor, I think this is what I  
20 want to say: The University of Georgia Center that we are  
21 talking about is nationally know. If you go back and look at  
22 *Bartlett*, one of the cases we cited, and you look at the *Root*  
23 case, which was in the Northern District and reversed on other  
24 grounds, one of their professors, Noel Gregg who is now at  
25 this point emerita, a Professor, was a lead witness. If you

1 go back and you look at the report -- and I think this is very  
2 significant -- it's on page 2. The very first paragraphs.

3 THE COURT: Wait just a minute, please. Let me get  
4 there. Okay.

5 MR. GOLDBERG: "The primary purpose of this  
6 evaluation and report is to establish if Mrs. Whyte is  
7 eligible for academic accommodations for disabilities as  
8 allowed by the Georgia Board of Regents and in accordance with  
9 Regents' guidelines for diagnosing learning disorders."

10 THE COURT: Well, now, but that doesn't mean that  
11 this incorporates or satisfies the ADA. I understand this is  
12 what it says, but I don't know what that means in terms of the  
13 ADA.

14 MR. GOLDBERG: This is what I think I would say.  
15 The only reason that anybody has to give accommodations is  
16 either the Rehabilitation Act or ADA.

17 And so what we have is the fact that we have the  
18 flagship University of this state making a determination as to  
19 accommodations, without harm to their academic reputation,  
20 without any harm whatsoever, and they're given absolutely no  
21 -- what's the word -- I don't want to use the term deference  
22 that's too far -- regard is what I will use.

23 In the Department of Justice consent order that we  
24 attached one of the things that they were supposed to do was  
25 to give due regard to the clinical observations. This is the

1 clinical observation.

2           When I look back and I read, you know, the pages  
3 that they sent today -- and I got them at 12 so I may not have  
4 read them as carefully as I needed to -- they have a  
5 psychologist Dr. Zecker, I believe his name is, he's from  
6 Iowa, and his report is from 2014, even before this thing is  
7 taken. So they have nobody who has done anything comparable  
8 to this. And they are simply saying that this report is worth  
9 absolutely nothing, but it's not. I don't think you can go  
10 around saying that the University of Georgia's standards are  
11 particularly low. I think they are particularly high. And I  
12 will just leave it at that.

13           THE COURT: Okay. Mr. Gillis, do you want to  
14 respond?

15           MR. GILLIS: Yes, Your Honor. One thing that the  
16 Court went through was the Plaintiff's academic background and  
17 testing. I do have some questions for her about further  
18 testing she had.

19           THE COURT: Go right ahead.

20           MR. GILLIS: Ms. Whyte, did you take the GRE?

21           THE PLAINTIFF: Yes, sir.

22           MR. GILLIS: Did you take that with any  
23 accommodations?

24           THE PLAINTIFF: No, sir.

25           MR. GILLIS: And you were admitted to Emory

1 University based upon that score of the GRE?

2 THE PLAINTIFF: They only cared about the math  
3 score.

4 MR. GILLIS: But you were admitted, correct?

5 THE PLAINTIFF: Yes, sir.

6 MR. GILLIS: And in medical school you took the MCAT  
7 twice, correct?

8 THE PLAINTIFF: Yes.

9 MR. GILLIS: And you took that without any  
10 accommodations?

11 THE PLAINTIFF: Yes, sir.

12 MR. GILLIS: And on the second test you scored in  
13 the 79th, 84 percentile?

14 THE PLAINTIFF: In the first test I scored in the  
15 6th percentile, I believe, yes, sir.

16 MR. GILLIS: Actually your first test was a 19 and  
17 23rd, wasn't it?

18 THE PLAINTIFF: 19 and 23rd? Thank you.

19 MR. GILLIS: And your second test was 79 to 84?

20 THE PLAINTIFF: Yes, sir.

21 MR. GILLIS: And that means that you were at the top  
22 20 percent of individuals taking the MCAT on that  
23 administration?

24 THE PLAINTIFF: Yes, sir.

25 MR. GILLIS: And that was done without

1 accommodations?

2 THE PLAINTIFF: Yes, sir.

3 MR. GILLIS: Your Step 1 Board you passed that  
4 without accommodation, didn't you?

5 THE PLAINTIFF: The second time, yes. I failed it  
6 the first time. I took a year to study for that exam. The  
7 same with the MCAT I took the Kaplan review four times before  
8 I was good enough to pass the MCAT well enough.

9 MR. GILLIS: And Step 2, Clinical Skills exam, you  
10 passed that without accommodation, correct?

11 THE PLAINTIFF: No, sir. Oh, Clinical Skills, yes,  
12 I did. That does not require any reading. Clinical Skills is  
13 you see 12 patients, I believe, or 15 patients. You have 15  
14 minutes to go in, get what you can from the patient, ten  
15 minutes to write up everything, come up with a diagnosis and a  
16 plan.

17 THE COURT: So how is that carried out?

18 THE PLAINTIFF: They use standardized patients. It  
19 is actors pretending to be whatever illness they want and you  
20 don't do anything like a pelvic exam, anything invasive.

21 THE COURT: So you are just in a room and they come  
22 in and they talk to you and you --

23 THE PLAINTIFF: It is suppose to be just like work.  
24 I go in -- I knock on the door, I go in the room and I say who  
25 I am, and I talk to them, "What's going on?" And then I do a



1 physical exam. And then I talk to them about, okay, here's  
2 what I'm hearing you say, here's what I think I want to do,  
3 what I think is going on, and then I leave and write that up.

4 THE COURT: Okay. All right. Mr. Gillis?

5 MR. GILLIS: Your Honor, those are the questions I  
6 had for her that laid the foundation for my next points.

7 This 6 percent on the Nelson-Denny Reading Test  
8 that's where reading rate is evaluated based upon one minute  
9 of reading. Here her performance on the standardized tests,  
10 the MCAT, the GRE, Step 1 and Step 2 where she had to write  
11 within ten minutes what she had, with no accommodations,  
12 refute this 6 percent finding.

13 Additionally, the UGA report, as the Court noted, is  
14 based upon a lot of self-evaluation.

15 THE COURT: Right.

16 MR. GILLIS: And the report notes: Relative to the  
17 general population Mrs. Whyte's basic reading decoding fell  
18 well within the average range. She has a pattern of generally  
19 average basic reading and writing skills. Her reading  
20 efficiency was a relative weakness, but that is relative to  
21 her overall superior verbal abilities. Her basic reading  
22 skills test that she was administered did not reflect academic  
23 underachievement as compared to the general population, and  
24 again there was no learning disability found in this report.

25 THE COURT: Okay. Now, let me ask a few other

1 questions.

2 THE PLAINTIFF: He said there was a hint of a  
3 learning disability, he could tell that it had been there, but  
4 because of all the education that I have and because of all  
5 the written word I have seen from the time I was younger until  
6 now, that tests for learning disability reading does not  
7 actually accurately diagnose me. And he said that he would do  
8 a different test, but that the standardized test people in  
9 this state do not accept it.

10 THE COURT: All right. Well, I want to ask a few  
11 questions here related to the irreparable harm component of  
12 this.

13 THE PLAINTIFF: Okay.

14 THE COURT: It's unclear to me what the irreparable  
15 harm is. I think it says if you don't pass this test you're  
16 going to be disqualified from medical school?

17 THE PLAINTIFF: Yes, sir.

18 THE COURT: Okay. Well, tell me about that.

19 THE PLAINTIFF: Okay. Because of these exams and  
20 it's actually taken me six years to finish school, not four --  
21 so time and a half. And I have passed all of my classes, all  
22 of the exams with it, Step 1. I have done all my clinical  
23 courses that I've had to do going through the hospital for two  
24 years. I have passed all of that. They have a 6-year rule  
25 that you have to have finished everything by six years from

1 when you started even if you took time off, and that rule  
2 comes up June 30th. I have to have a passing score on Step  
3 2 Clinical Knowledge in order to graduate. If I do not get  
4 that by June 30th then I don't get to graduate, I don't get  
5 the degree, \$300,000 thrown down the drain, no pass go.

6 THE COURT: Okay. And so this is not some kind of  
7 National Standard, it's just a requirement of the Medical  
8 School?

9 THE PLAINTIFF: I asked the school about that. It  
10 was unclear whether it was a National Standard this six year  
11 rule. It may be just them, I'm not sure.

12 THE COURT: But a rule is a rule. That's the point.

13 THE PLAINTIFF: Yeah, the rule is the rule. And  
14 because the NBME takes a while to grade the test and they  
15 don't give you an exact amount of time of when they'll have  
16 your score out -- I called the NBME up and they said you have  
17 to have the exam done by May 30th if you want the score by  
18 June 30th.

19 THE COURT: Okay. Are there any other tests or  
20 exams that you have to take or is this the last one?

21 THE PLAINTIFF: To graduate? This is the last one.  
22 After those, there is a Third Step to the licensing exam. I  
23 can take that anytime between now and, I think, my first year  
24 of residency. And then at the end of my residency I will take  
25 a board exam, and then for the rest of my life I believe it's

1 every ten years you retake boards.

2 THE COURT: Have you been accepted into a residency  
3 program?

4 THE PLAINTIFF: No. I dropped out of the match  
5 because I did not pass Step 2, CK. And because I did not pass  
6 Step 2 CK there is a question of whether I will graduate which  
7 is why I dropped out of the match.

8 THE COURT: Okay. I understand.

9 THE PLAINTIFF: Match is when you apply for  
10 residency. I did, however, get a lot of interviews or some  
11 interviews.

12 THE COURT: Either one of you want to talk about  
13 this issue, questions, observations? Do you want to ask her  
14 anything? I'm giving you -- along the way I'm giving you the  
15 opportunity to respond or to solicit information from her,  
16 evidence from her, if you would like to do that. So now is  
17 the opportunity before I move on to something else.

18 MR. GILLIS: Sure, Your Honor. Ms. Whyte, you took  
19 the Step 2 CK exam in 2016; is that correct?

20 THE PLAINTIFF: I think so.

21 MR. GILLIS: And you missed that exam by five  
22 points?

23 THE PLAINTIFF: Four, I believe. Is it 209 to pass?

24 MR. GILLIS: Four or five, correct?

25 THE PLAINTIFF: Yeah, four or five.

1 MR. GILLIS: Your Honor, this irreparable harm  
2 argument, I think, fails here because she took this exam in  
3 2016. She could have taken the CK exam multiple times since  
4 then to get a score without accommodations. She can sit here  
5 and take the exam without accommodations on the 24th.

6 THE COURT: Well, let me ask her. Why didn't you  
7 take this since you failed it the first time?

8 THE PLAINTIFF: I failed it in December, I believe,  
9 it was like the end of December. I missed Christmas. And I  
10 didn't find out I failed until January. That's when I went  
11 and talked to my lawyers. Because I had taken the exam --

12 THE COURT: Wait a minute. It took six months to  
13 get the score? You took it in the summer and you didn't find  
14 out --

15 THE PLAINTIFF: No. It took like three to four  
16 weeks. It took four weeks to get the score back.

17 THE COURT: Okay. I misunderstood what you said.  
18 When did you take it?

19 THE PLAINTIFF: I took it like December 28th, I  
20 think.

21 THE COURT: This summer?

22 THE PLAINTIFF: No. I'm sorry, I took it December  
23 28th.

24 THE COURT: Oh December. Okay.

25 THE PLAINTIFF: I'm sorry.

1 THE COURT: Thank you.

2 THE PLAINTIFF: I got the score back, I think,  
3 sometime the end of January. I had to talk to the school, go  
4 through multiple, I guess, hearings convincing the school to  
5 give me a second chance to take the exam.

6 So it's not as easy as taking the MCAT where you  
7 just sign up and go. Also, when you are applying for  
8 accommodations, which I did do again, you cannot sign up for  
9 the exam or take it while you are applying for accommodations.  
10 So I had to wait for them to get back to me.

11 THE COURT: Is that a school rule or is that a --

12 THE PLAINTIFF: That is an NBME rule.

13 THE COURT: Okay.

14 THE PLAINTIFF: I talked to the school, figured  
15 everything out, I put everything together. I put together any  
16 new information I could find for them, talked to my lawyers.  
17 We sent out the application February 23rd. They did not get  
18 back to me about it so I called them every day that week until  
19 somebody finally answered the phone and said "We don't have  
20 anything from you." And I said, "Yes, you do. I sent it to  
21 you." They finally got it. It took them over two months to  
22 get back to me. That is why it took so long for me to be able  
23 to take this exam.

24 On top of that I have been taking a program called  
25 the Pass Program to help me study for and prepare for this

1 exam and that has also been taking up time.

2 THE COURT: Okay. Mr. Gillis?

3 MR. GILLIS: Your Honor, my point being that any  
4 time in this process after she failed Step 2 CK exam she could  
5 have filed this lawsuit, filed it through the injunction. She  
6 waited until the eleventh hour. It's an emergency of her own  
7 making. However, there's no irreparable harm here. Her past  
8 test performance is if she does poorly the first time, the  
9 second time she succeeds. This harm is speculative. And the  
10 fact that she made very --

11 THE COURT: Well, it sounds like she's going to get  
12 kicked out of school if she doesn't pass it?

13 THE PLAINTIFF: Yes. That is it.

14 MR. GILLIS: But, Your Honor, she knew that in 2016  
15 after she failed the exam, hired lawyers and filed for  
16 accommodation. She could have filed for this injunction at  
17 that time.

18 THE COURT: Well, it sounds like you're making a  
19 negligence argument now.

20 MR. GILLIS: Well, I think it does weigh in the  
21 irreparable harm, one's failure to mitigate your own damages  
22 does matter here in the extraordinary remedy.

23 THE PLAINTIFF: I --

24 THE COURT: I'll give you an opportunity to respond.

25 THE PLAINTIFF: Sorry.

1 MR. GILLIS: It does matter because as the Court  
2 noted she is seeking an extraordinary remedy and the  
3 timeliness of that does matter.

4 THE COURT: Okay.

5 THE PLAINTIFF: I have a question.

6 THE COURT: Go ahead.

7 THE PLAINTIFF: I took my exam last December. I  
8 believe that was -- this year is 2018, am I right? So that  
9 was 2017. Your dates are wrong.

10 MR. GILLIS: Well, at any point, January is when she  
11 figured out she failed the exam.

12 THE PLAINTIFF: January of this year. And I told  
13 you exactly why it took that long for me to be able to take  
14 the -- I could not take the exam and we did not file -- my  
15 lawyers can actually answer the question as to why we have not  
16 filed until now.

17 MR. GILLIS: Your Honor, she also had filed for  
18 accommodations previously and was denied and at that point she  
19 could have also filed a lawsuit seeking an injunction.

20 THE PLAINTIFF: It did not --

21 MR. GILLIS: My point is, at numerous points down  
22 this road, the Plaintiff could have sought a remedy that was  
23 not this extraordinary remedy at the eleventh hour.

24 THE PLAINTIFF: Can I ask a question or say  
25 something? Is that all right?



1 THE COURT: Yes.

2 THE PLAINTIFF: I did not -- it never occurred to me  
3 that I could hire a lawyer to help me with this. On top of  
4 that, I'm not rich. My husband and I are living paycheck to  
5 paycheck. We have never had the money to pay for a lawyer.  
6 We have taken out extensive loans for this. Before all that I  
7 thought I could do this if I just put my nose to the grind  
8 stone and work hard, which is what I have always done with  
9 these exams. But I cannot take a year off every time I have  
10 to take the boards. I will lose a year of work.

11 THE COURT: Here is another question -- well,  
12 Mr. Gillis, were you finished with that?

13 MR. GILLIS: Yes, Your Honor.

14 THE PLAINTIFF: I'm sorry, Mr. Gillis.

15 THE COURT: Let's say that the Court allows you the  
16 accommodations that you request here. I guess one of the  
17 questions that we don't know the answer to is even with the  
18 accommodation are you going to pass the exam?

19 THE PLAINTIFF: Yes, sir, I believe I will.

20 THE COURT: And what's the basis of that?

21 THE PLAINTIFF: The testing they did on me there I  
22 scored -- I could actually finish the sections of the exam  
23 instead of having to put in guesses for the last five or six  
24 questions. I could finish those questions.

25 On top of that I would actually have maybe a minute

1 to think about the answer. When you're talking about  
2 medicine, you're talking about how the body works. This exam  
3 is very well laid out in that it's not just asking you what is  
4 this, what is this, what does that mean. I'm not having to  
5 search for a keyword. Instead they are saying you know this,  
6 now we're going to give you this obscure way of looking at it  
7 and see if you understand it. Is a minute and thirteen  
8 seconds long enough to read a passage, a three paragraph  
9 passage, and be able to explain how you understand it? If I'm  
10 talking about say hypothyroidism and -- I'm like -- I'm having  
11 to think about, okay, I've got to go back to the hypothalamus,  
12 the pituitary, then the thyroid, and the liver, where is the  
13 problem along there? I'm having to think through each part  
14 and that takes time. And I believe that if I had time and a  
15 half that would give me enough time to finish those last five  
16 questions of every section of which there are eight, it's 40  
17 questions, and time to actually think about the answer a  
18 little better.

19 When I was working with my professor, Dr. Cohen, he  
20 would go over questions I missed with me, we called them low  
21 hanging fruit questions. I would read the question with him  
22 and without even looking at the answer I know the answer. And  
23 then he says, "Well, why did you pick this answer?" I don't  
24 know, because I didn't have time to think about it, I didn't  
25 have time to read it.

1           THE COURT: Okay. Now let's see. I'm looking at  
2 the brief, NBME's brief. I'm looking at that now and I just  
3 made some notes. I'm going to look through these notes to  
4 just see what caught my attention.

5           THE PLAINTIFF: I had one other thing to say to what  
6 Mr. Gillis had said about taking the exam multiple times.  
7 You're only allowed to take it three times in your life, in  
8 case you didn't know that.

9           THE COURT: Well, one of the legal issues here --  
10 and it's a very important legal issue and I've already  
11 mentioned it -- and that is in determining whether she is  
12 disabled or not. The measure is not her peers, but the  
13 general population, and I know that's a position that the  
14 board has taken here. This is a question for the lawyers.  
15 What's your position on that?

16           MR. GOLDBERG: Your Honor, I think that it's not  
17 quite that simple. I think the new amendments have changed  
18 it.

19           THE COURT: The '08 amendment?

20           MR. GOLDBERG: The 2008 amendments.

21           THE COURT: '08?

22           MR. GOLDBERG: Yes. Your Honor, I attached a law  
23 review article and I think he says it better than I did,  
24 because he worked on it a lot longer than I worked on this  
25 brief. But I mean, one of the problems is this, it seems to

1 me that we are not -- and this really comes through in their  
2 brief it seems to me. It basically comes through that if you  
3 are exceptionally bright, no matter what, you don't need  
4 accommodations, and if you're not exceptionally bright you  
5 don't deserve to be a doctor.

6 THE COURT: That's not the inference I drew. The  
7 inference I drew is that there is a lot of abuse of this  
8 diagnosis, and that they are trying to be very careful that  
9 this isn't one of the abuse situations. That's the way I  
10 understand what they're trying to say here.

11 MR. GOLDBERG: Well, Your Honor, the reason I think  
12 I differ -- I think if you look at their letters. One of the  
13 things -- well, let me start off this way. Your Honor, I  
14 attached the Department of Justice consent order and that  
15 actually has value. I found this out yesterday when I was  
16 doing my research. According to the Supreme Court even  
17 consent orders of administrative agencies are entitled to  
18 deference. Under *FTC versus Mandel Brothers* at 359 US 385,  
19 391. But what I think -- if you go look at the letters she is  
20 presenting a history of accommodations, which is one of the  
21 things under the regulations that is most important. But what  
22 does the board say in their letters? Well the history of  
23 accommodations doesn't matter. Now they said it a little more  
24 elegantly than I just did, but that's what they said.

25 I think the point is this: If you look at all the

1 clinical evaluations -- and I keep coming back to UGA because  
2 there is no answer to the UGA report. None. The expert that  
3 I saw in their report, did his report in 2014 --

4 THE COURT: Well, I read the one in '16. I didn't  
5 have the time to read the one in '14. There was some very  
6 interesting data that was used here: Score reports from high  
7 school graduation tests; records from the "student support  
8 team" meeting and subsequent accommodation plan in Grade 11;  
9 transcripts from college and medical school, as well as  
10 additional performance evaluations from medical school; scores  
11 from SAT, MCAT, AP tests; reports from diagnostic evaluations  
12 completed in '88, '09 and '15; confirmation of accommodations  
13 in medical school and in part in high school, and evidence  
14 that parents requested disability services. You know, 702?  
15 That's adequate data as far as I'm concerned.

16 And there is information in here -- you know, this  
17 evaluation done in '88 and they're talking about: "the  
18 evaluators also observed that she seemed tired and easily  
19 frustrated on the day of testing; they concluded that she may  
20 simply be slow to develop certain skills, or might have a  
21 learning disability, but that was too early to tell. In  
22 addition, they noted the parent and teacher rating scales were  
23 "not significant" for attentional problems." And I've  
24 explained the importance of that.

25 "Her report cards used numerical codes for narrative

1 comments and all of her comments from teachers were positive  
2 although codes were available for inattentive and disruptive  
3 behavior, her teachers never endorsed these for her, instead  
4 repeatedly describing her as being a pleasure to teach. In  
5 her application, she appears to report accommodations  
6 throughout her high school time, but her documentation  
7 actually suggests otherwise; it appears that in the middle of  
8 the 11th grade; her parents wanted to ensure that she would  
9 have an extended time on the college admission exam."

10 MR. GOLDBERG: Well, Your Honor, the middle of the  
11 11th grade is not --

12 THE COURT: The fact that this is stated in here  
13 does not mean I'm accepting this. I'm trying to read some  
14 important things out of it. Because what you have here, in  
15 terms of -- you're saying and this is the response to what you  
16 said, you're saying that this report from the University of  
17 Georgia is not refuted, and this report -- by someone who I  
18 assume is qualified, they have a Ph.D -- is explaining what  
19 those problems are. And, you know, she reportedly took the  
20 GRE without accommodation and gained entry into the public  
21 health graduate program.

22 MR. GOLDBERG: Your Honor, are you reading the 2014  
23 report?

24 THE COURT: I'm reading in the 2016 report. That  
25 was the most current one.

1 THE PLAINTIFF: Your Honor, that's not something I  
2 got, I don't think.

3 MR. GOLDBERG: Your Honor, I apologize. Could you  
4 tell me -- I don't remember seeing that report. I apologize.

5 THE COURT: Well, I obviously don't know what you  
6 got.

7 MR. GOLDBERG: Your Honor, the report that I was  
8 talking about, the one that I could find in your pages, is  
9 dated May 28th, 2014.

10 THE COURT: Right. And I have that one but I didn't  
11 have time to read it, but I wanted to read the most current  
12 report and that's the 2016 report. Are you telling me you  
13 don't have that report?

14 MR. GOLDBERG: Your Honor, is it by the University  
15 of Georgia?

16 THE COURT: No.

17 THE PLAINTIFF: It's by the NBME?

18 THE COURT: This is the report that came from  
19 Mr. Gillis' expert. Is that correct, Mr. Gillis? Am I  
20 understanding this correctly?

21 MR. GILLIS: I think you are. Your Honor,  
22 Mr. Burgoyne is on the line. He gathered it for us.

23 MR. BURGOYNE: Yes, Your Honor. That's one of the  
24 external professionals that NBME consulted.

25 THE COURT: Right. And that's what I mentioned at

1 the very beginning of all this.

2 MR. BURGOYNE: Yes.

3 MR. GOLDBERG: Your Honor, what Exhibit Number is  
4 it?

5 MR. BURGOYNE: It's attached to the declaration of  
6 Kathy Farmer.

7 THE COURT: Nothing has any exhibit numbers on it.

8 MR. BURGOYNE: It should have gone in with exhibit  
9 numbers, Your Honor, but we will have to double check that.

10 MR. GILLIS: Your Honor, it's Exhibit H to the  
11 declaration.

12 MR. BURGOYNE: Yes. So it did go in.

13 MR. GOLDBERG: Your Honor, I'm sorry, I now see it.

14 THE COURT: Okay. Good. And I read from this and  
15 if you'll look on page 2 of that exhibit -- and we've already  
16 talked about this -- now I'm on the first full paragraph on  
17 page 2 in the last sentence, which is a long sentence --

18 "However, Mrs. Whyte took the MCAT twice without  
19 accommodations (her request was reportedly denied); the first  
20 time some of her scores were below the average range (for  
21 medical school applicants), whereas the second time, all of  
22 her scores were in the average range or above with her  
23 composite score being better than 80 percent of the medical  
24 school applicants." Now Mr. Gillis pointed that out earlier.

25 And it says, "Briefly, there is insufficient



1 evidence of ADHD. Really, the only evidence even consistent  
2 with the disorder has been the presence of symptoms reported  
3 by (a) Ms. Whyte, her friend, and family members during  
4 evaluations being conducted to determine her need for  
5 accommodations and medical school faculty. The more recent  
6 reports of inattentive symptoms could be due to a variety of  
7 other factors; the incentive to obtain accommodations" --  
8 which is what I mentioned earlier -- "a general negative  
9 self-concept" -- which is very clear from the record -- "the  
10 presence of anxiety and/or depressive feelings" -- which is  
11 very clear from the record. "In particular, there is a lack  
12 of objective evidence of ADHD symptoms; the only performance  
13 test designed specifically for measuring such symptoms was  
14 administered in 2015 and failed to find evidence of such  
15 symptoms." And I explained that.

16           So I'm not saying that I'm accepting this, but this  
17 is clearly disputing what is presented as a report from the  
18 University of Georgia Regents Department or whatever the name  
19 of that is.

20           THE PLAINTIFF: May I answer that MCAT question?

21           THE COURT: What's that?

22           THE PLAINTIFF: The MCAT?

23           THE COURT: Right.

24           THE PLAINTIFF: It's a very different exam than the  
25 USMLE. The MCAT gives you a -- I forget what it's called -- a

1 passage and then several questions on the passage. I studied  
2 with Kaplan. Kaplan showed me how to take the MCAT without  
3 having to read the full passage. All you do is map out the  
4 passage based on the first sentence of every paragraph, then  
5 you read the question, you know exactly where the answer to  
6 that question is, you look quickly, and answer the question.

7 THE COURT: Okay.

8 THE PLAINTIFF: But NBME or USMLE is a long passage  
9 and then a question. There's 40 of them per section, eight  
10 sections.

11 THE COURT: Okay.

12 MR. GOLDBERG: Your Honor, having looked at it now  
13 this is what I would say. DSM-5 says -- 5, not the 4. DSM-5  
14 says you're supposed to rely upon clinical analysis and  
15 clinical analysis is every bit as important as objective  
16 testing, and that's what the people at the University of  
17 Georgia did. That's not what this gentleman did.

18 THE COURT: Well, this gentleman certainly didn't  
19 interview her or talk to her. There's no question about that.

20 MR. GOLDBERG: No, I agree. Of course he could not  
21 have, okay. I'm not saying that he should have, but what I am  
22 saying is that that's not the same thing as completely  
23 discounting the nonobjective analysis that the University of  
24 Georgia did.

25 THE COURT: Right. And what I'm trying to do is

1 look at all the evidence here that has been presented to the  
2 Court and that's what I -- I've already talked about the  
3 standards.

4 Okay, now I don't think I have anymore questions for  
5 her.

6 When actually is this exam? Is it Thursday or is it  
7 Wednesday? What's the date of the exam?

8 THE PLAINTIFF: The twenty-fourth, but I can sign up  
9 for the 28th if I need to.

10 THE COURT: Okay.

11 MR. GILLIS: I may have misstated that, Your Honor,  
12 I apologize.

13 THE COURT: All right. I mean, you talked about  
14 some of these mechanical problems.

15 MR. GILLIS: Yes, Your Honor.

16 THE COURT: Now, I'm ready for her to come sit back  
17 down, but if there is anything that either one of you would  
18 like to ask her go right ahead.

19 MR. GOLDBERG: No, Your Honor.

20 THE COURT: And I've liberally let her respond to  
21 these issues as they come up and I also let y'all respond.  
22 So, thank you very much. You may have a seat back there.

23 THE PLAINTIFF: Thank you.

24 THE COURT: I'm not really sure that anything has  
25 changed about this since I read all this material. It's

1 basically what I thought it was going to be when I came in  
2 here. And I think that -- I'll be happy to --

3 Tell you what, we've been going now for quite a  
4 while. Let's take a short break. About a five or ten minute  
5 break and we'll come back.

6 (Recess at 4:48 PM)

7 (Resume at 5:08 PM)

8 THE COURT: At the beginning of this when I went  
9 through and talked about the elements for proving a TRO I said  
10 that I thought that basically the substantial likelihood of  
11 success on the merits was one question and the irreparable  
12 harm was really others and that three and four didn't really  
13 count for much. But Mr. Gillis, you said that you thought  
14 there was a failure on all four. So I'm going to give you the  
15 opportunity to tell me why there is a failure on three, that  
16 threat and injury must outweigh the harm that the TRO will  
17 cause to the nonmoving party.

18 MR. GILLIS: Yes, Your Honor. In their brief they  
19 made no effort to balance the harms. Testing accommodations  
20 are provided by my client, but they deny those accommodations  
21 when the applicant has not established a disability. And the  
22 balance of harm -- the progress of the test, to make sure the  
23 test scores are valid is -- what the Court pointed out when we  
24 were talking about whether or not this ADHD diagnosis is  
25 abused. The idea is that there is a balance here in the

1 equities of the test being fair and fairly administered.

2 I think that's under -- there is a *Rothberg* case out  
3 of the Tenth Circuit and I think that -- it's in our brief,  
4 Your Honor -- I think that's -- it's at least where -- it is  
5 at least neutral, that she has not, at least, proven that the  
6 equities tip in her favor.

7 THE COURT: Well, to me it seems like the threatened  
8 injury is the inconvenience as opposed to some kind of global  
9 or national problem. I understand what you're saying, but  
10 that's not the way I think about this component of the TRO  
11 elements. Do you understand what I mean by that?

12 MR. GILLIS: I do understand, Your Honor.

13 THE COURT: Yeah. And you pointed out at the  
14 beginning that there were some mechanical problems with this.

15 MR. GILLIS: Yes, Your Honor.

16 THE COURT: And so that's really what seems to me  
17 the problem is.

18 I understand why the National Board of Medical  
19 Examiners would challenge something like this, and I  
20 understand why they would say that the integrity of the test  
21 and the results could be affected if they let people take this  
22 test who didn't have a legitimate ADA impairment. And all  
23 that makes very good sense to me, and I understand the  
24 societal background for this. But that becomes remote in my  
25 mind, assuming that there is a decision made that there is a

1 substantial likelihood of success on the merits, which in this  
2 particular case means that there's a finding that she has a  
3 disability under the ADA, that she is likely to prevail on  
4 that. Do you agree with what I just said?

5 MR. GILLIS: Yes, Your Honor.

6 THE COURT: Do you agree with what I just said?

7 MR. GOLDBERG: I do, Your Honor.

8 THE COURT: And so the next one is number four, the  
9 TRO must not be adverse to the public interest.

10 MR. GILLIS: There are two concerns here. One, I've  
11 already addressed to the Court, the integrity of the test.  
12 The second one is, this is a minimum competency exam for  
13 medical doctors.

14 THE COURT: Right.

15 MR. GILLIS: And if that test is violated that's the  
16 issue there in the public interest is having, at least,  
17 minimally competent doctors as based on the exam.

18 THE COURT: Okay. That's an interesting argument.  
19 Do you want to respond to that?

20 MR. GOLDBERG: Your Honor, I would think the public  
21 has an interest in preventing all kinds of discrimination and  
22 that that interest in preventing discrimination outweighs  
23 their interest. And I might add --

24 THE COURT: Well, the discrimination is not the  
25 issue. The issue is the delivery of good medical care by

1 someone who is not necessarily competent to handle this.

2 MR. GOLDBERG: Your Honor, if, in fact, this was the  
3 last door that my client had to go through and she was going  
4 to be let loose on the road incompetent -- perhaps. But she  
5 also has to take --

6 THE COURT: All of the doors have to be gone  
7 through. It's not just the last door that has to be gone  
8 through. All the doors have to be gone through.

9 MR. GOLDBERG: Your Honor, I would think that if, in  
10 fact, she was able to go through Step 3, and if the fact she  
11 was able to go through the medical boards to become a doctor,  
12 that that would certainly weed out anybody who wasn't  
13 qualified to become a doctor. I find it hard to believe that  
14 this is the last thing standing between me and my medical  
15 care. I just can't believe it.

16 THE COURT: Well, I can understand that. Whether  
17 that's significant enough in this -- whether that is --  
18 whether we can make a prediction about that though is a  
19 different matter. I can certainly think of certain medical  
20 specialties that -- what I have heard today this could be a  
21 problem for her.

22 So, now, what we're left with is substantial  
23 likelihood of success on the merits. You know, this always  
24 comes up and -- most of the time what we have when we have a  
25 TRO -- especially since 2007 -- has been situations in which

1 its a mortgage, it's a condemnation case, and that's how these  
2 usually come up. And so this is an unusual situation, which  
3 is fine. I certainly don't have any problem with it being  
4 unusual, I deal with unusual all the time.

5 But I just have a practical question. How is  
6 substantial likelihood of success on the merits determined?  
7 In other words, is that if this case were tried before a judge  
8 or is that for a jury? How do I analyze that?

9 MR. GOLDBERG: Well, Your Honor, I wish that was an  
10 easy question to answer. I think I would say this, as I dove  
11 through Wright and Miller this weekend, they used the term  
12 *prima facie* case. And then they said that most circuits, even  
13 though they don't use that term, are applying that test.

14 Now, I'm not going to tell you I found a case in the  
15 Eleventh Circuit that used that term because I didn't.

16 THE COURT: You didn't, you're right.

17 MR. GOLDBERG: I think it gets back to that sliding  
18 scale.

19 THE COURT: Well I'm not convinced that sliding  
20 scale is the law either. You haven't convinced me about that  
21 either.

22 MR. GOLDBERG: Your Honor, I simply say that the  
23 *Texas versus Seatrain International* case has not been  
24 reversed.

25 THE COURT: That's an old Fifth Circuit case. Is



1 that what it is?

2 MR. GOLDBERG: Right. And normally it comes with  
3 one of those foot notes that these cases are controlling and  
4 they say see Bonner versus so-and-so.

5 THE COURT: I know. I'm familiar with that.

6 MR. GOLDBERG: Yeah, Your Honor, I don't think that  
7 law is not good anymore. But I think the answer is, you know,  
8 you need to make -- well, Your Honor, it's really hard because  
9 when you read these cases most of them actually come down to  
10 summary judgment. And I cited any number of cases where, for  
11 example, summary judgment was denied and the Court said it was  
12 up to the jury to make that determination.

13 The *Pinckney* case is the one that comes to mind  
14 immediately from Judge Ward about ten years ago. I think  
15 you've got to make the best determination you can make about  
16 whether or not there is any kind of probability. And I think  
17 probability in this case is the 51 percent.

18 THE COURT: Well, I don't know that preponderance of  
19 the evidence standard applies either -- that a substantial  
20 likelihood of success on the merits?

21 MR. GOLDBERG: Well, Your Honor, I would simply say  
22 as I understand the term prima facie case, probability is a  
23 lot higher than prima facie case.

24 So I mean I'm --

25 THE COURT: Prima Facie case just means that you can

1 make out the elements. It doesn't mean that you succeed on  
2 the elements.

3 MR. GOLDBERG: Well, you know, Your Honor, I looked  
4 at that from Wright and Miller and I wondered the same thing.  
5 But then Mr. Wright is dead and Mr. Miller is more famous than  
6 I am so I thought, well, maybe he's right. But I still  
7 couldn't find an Eleventh Circuit case that said that.

8 THE COURT: Right.

9 MR. GOLDBERG: I don't think we need to prove beyond  
10 a shadow of a doubt.

11 THE COURT: I agree with that.

12 MR. GOLDBERG: And I think if you look -- you make  
13 your best bet as to who is going to win. I don't know how  
14 else to put it. I realize that's --

15 THE COURT: Let me ask Mr. Gillis, what Mr. Gillis  
16 thinks about that?

17 MR. GILLIS: Your Honor, I think in this case and  
18 all cases of a TRO you're talking about upsetting the status  
19 quo. And so to upset the status quo has to have a heightened  
20 burden on the Plaintiff, a substantial likelihood of success.  
21 The word substantial has to mean something and likelihood has  
22 to mean something.

23 THE COURT: Right.

24 MR. GILLIS: In here, this case is built --  
25 Plaintiff's case is built on her comparison as to her peers

1 and not to the general population.

2 THE COURT: Right. I understand.

3 MR. GILLIS: And I think when this Court compares  
4 her to the general population she cannot meet her burden of  
5 substantial likelihood of success. And that's where I think  
6 it falls.

7 THE COURT: Well, I understand that that is the  
8 heart of your argument, and I think that's your best argument.  
9 That's certainly what I understood from the brief that I  
10 thought was a very good brief.

11 Anything further?

12 MR. GOLDBERG: Your Honor, yes, I think there are a  
13 few things further. Your Honor, I realize you have been here  
14 a long time and I appreciate your patience, for one of a  
15 better word.

16 The ADA and its regulations are supposed to be read  
17 liberally.

18 THE COURT: I understand.

19 MR. GOLDBERG: And as the old Fifth Circuit said  
20 that means that you strain to provide the remedy and not to  
21 avoid it.

22 The Eleventh Circuit -- that's what Starks said,  
23 Your Honor, and Starks was affirmed by the Fifth Circuit.  
24 It's an old truth in lending case.

25 The regulations are also supposed to be looked at.

1 And I think if you look at the regulations, which talk about  
2 the idea, that substantially limited is not supposed to be a  
3 known or a standard.

4 Your Honor, there is one thing I did want to mention  
5 because I think I missed it in the beginning. The DSM pointed  
6 out about 12 years old is not that you have to have the  
7 diagnosis by 12 but you have to have the proof of the symptoms  
8 before 12, and I think that's what she has. And I think if  
9 you go look at the Decatur school documents you'll see that  
10 they note that there is an ADHD diagnosis and there is a  
11 psychologist who would never have said that unless there was  
12 some kind of doctor's report.

13 Now, have I seen the doctor's report? I have not.  
14 But, Your Honor, I think given the fact that it is supposed to  
15 be read liberally I think that counts for something, given the  
16 fact that this comes after the amendments to the ADA.

17 I mean, if you look at basically most of the cases,  
18 not all the cases -- I'm not going to say all because there  
19 are one or two that are after the amendments that they cite.  
20 All of them, including *Rothman*, are prior to the amendments.  
21 And what the amendments did was they said that we are going to  
22 wipe out Supreme Court precedent that we don't like and they  
23 specifically overruled *Sutton* and they specifically overruled  
24 the *Toyota* case, and the house committee specifically noted  
25 about a number of these testing cases and they said we're not

1 going to follow them. And they cited to *Wong*, and they cited  
2 to a case out of West Virginia, I think *Perez* is what it's  
3 called. So that those cases show that they were trying to  
4 make this just as strict on behalf of the applicant as they  
5 possibly could.

6 Your Honor, I have cited any number of cases in my  
7 reply brief where mandatory injunctions were granted, even  
8 TRO's were granted. Wright and Miller, again without citing  
9 to the Eleventh Circuit case, point out that there are, in  
10 fact, numerous cases where there are TROs that are granted.

11 And I cited one from Judge O'Kelley where he granted  
12 a preliminary injunction to a student and allowed her to  
13 continue to attend school even though she had been charged  
14 with some kind of offense and found guilty of that offense.  
15 He found that she hadn't gotten due process and he put her  
16 back into school immediately. But that's all in my reply  
17 brief.

18 THE COURT: Okay. Do you want to respond to that,  
19 Mr. Gillis, to anything that he just said?

20 MR. GILLIS: Your Honor, I would like to respond at  
21 the end.

22 THE COURT: This is the end.

23 MR. GILLIS: This is the end. Then I'll respond.

24 Here's the thing. You asked about substantial  
25 likelihood of success. There's no objective test that says

1 she has ADHD. A diagnosis is not a disability. The Act as  
2 amended does not remove the bar of a substantial limitation in  
3 a major life activity. It does not remove that bar and she  
4 has to prove that to win her case.

5 Her own doctor says she has no learning disability  
6 and she's average on every test.

7 The statement was made that we're not considering  
8 the 2015 UGA report. We are. And we considered it and had a  
9 report done in 2016, but the UGA report in and of itself says  
10 she does not have a learning disability. Her own test scores  
11 on the MCAT, the GRE, the Step 1, Step 2 CS without  
12 accommodation show that she can pass these exams. These are  
13 hard test. You heard testimony from the Plaintiff that she  
14 has to think about the answers. Every test-taker has to think  
15 about the answers and every test-taker would like more time.  
16 That's the purpose of the exam, and that's the integrity of  
17 the exam.

18 She hasn't met her extraordinary burden for the TRO.  
19 And again, the substantial limitation, the language to confirm  
20 that someone has a disability under the Act was not removed in  
21 the 2008 amendment.

22 THE COURT: Anything further?

23 Well, this is what we are going to do. I went back  
24 there at the break and read the DSM-5 elements of proof for --  
25 not elements of proof, but you have to have six of those

1 characteristics -- and after I read those -- and what was  
2 interesting about that is that I didn't find much evidence for  
3 a lot of those, quite frankly, from everything that I have  
4 read and everything that I have heard.

5           You've really kind of hinged your case on that. I  
6 don't think the ADA requires that there be a diagnosis of ADHD  
7 here in order for there to be some kind of disability. I  
8 don't think that that has to be established.

9           I think that probably what has been established here  
10 is that for whatever the reason may be, and that is allusive,  
11 but the facts of the case, the history of the case, her  
12 testimony, her explanation for how she succeeded on these  
13 tests like the MCAT, for example, and the GRE and all that,  
14 the fact that she did get the accommodations back in -- and I  
15 think it was 1999 when she was in the 11th grade -- the fact  
16 that she has gotten all of these accommodations all this time  
17 through Georgia Tech and at Emory, and the fact that what she  
18 got over the course of that time -- that what she got over the  
19 course of that time is essentially what she's asking for here,  
20 I'm going to find that the motion should be granted.

21           So I certainly understand why the Defendant in this  
22 case would be concerned about this. I certainly think that  
23 the Defendant in this case ought to be fighting these when  
24 they think that they are suspicious. I don't have any problem  
25 with that at all. But under the circumstances of what I have

1 heard I think there is a likelihood of success.

2 If this was to go before a jury, for example, I  
3 don't think the jury would have any trouble at all in deciding  
4 that this woman needed an accommodation.

5 So I'm going to grant that.

6 Now what does that mean for purposes of how she's  
7 going to take the exam?

8 MR. GOLDBERG: I assume that I'm going to have to  
9 sit down with Defendant's attorneys and figure that out by  
10 tomorrow.

11 THE COURT: Okay.

12 MR. GOLDBERG: But it certainly is going to include  
13 one and a half times and it's certainly going to include a  
14 quiet room.

15 THE COURT: Right. I understand. She also asked  
16 for written directions. I don't know how the directions come.

17 THE PLAINTIFF: They are already written.

18 MR. GOLDBERG: Your Honor, I believe they are  
19 already written. I think that counsel and I can get those  
20 things and I think we'll get them done.

21 THE COURT: All right. Very good.

22 Anything further about this? Any questions that you  
23 have about what I have done or why I did what I did?

24 I think this is a very difficult case quite frankly.  
25 All right.



1 MR. GOLDBERG: Thank you, Your Honor.

2 CSO OFFICER: All rise. Court is adjourned.

3

4 (Proceedings concluded at 5:27 P.M.)

5 END OF RECORD

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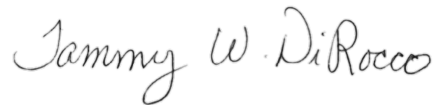
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## 1 CERTIFICATE OF OFFICIAL REPORTER

2  
3 I, Tammy W. DiRocco, Federal Official Court Reporter, in  
4 and for the United States District Court for the Middle  
5 District of Georgia, do hereby certify that pursuant to  
6 Section 753, Title 28, United States Code, that the foregoing  
7 is a true and correct transcript of the stenographically  
8 reported proceedings held in the above-entitled matter and  
9 that the transcript page format is in conformance with the  
10 regulations of the Judicial Conference of the United States.

11  
12 Dated this 25th day of May, 2018

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16 Tammy W. DiRocco CCR  
17 Federal Official Court Reporter  
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